

CITY AND COUNTY OF SAN FRANCISCO

OFFICE OF THE CITY ATTORNEY



DENNIS J. HERRERA
City Attorney

KATE HERRMANN STACY
Deputy City Attorney

DIRECT DIAL: (415) 554-4630

E-MAIL: kate.stacy@sfgov.org

FACSIMILE COVER SHEET

Monday, October 23, 2006; Time: 10:32 AM

TO:	OF:	PHONE:	FAX:
Thomas L. Morrison, Deputy Executive Director	California Building Standards Commission		(916) 263-0959

FROM:	OF:	PHONE:	FAX:
Kate H. Stacy	City Attorney's Office	(415) 554-4617	(415) 554-4757

MESSAGE

Re: Approval of CPVC, PEX, PEX-AL-PEX, ABS and PVC Piping in the 2007 Plumbing Code

Letter dated October 23, 2006

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October 23, 2006

Mr. Dave Walls
Executive Director
Mr. Thomas L. Morrison
Deputy Executive Director
California Building Standards Commission
2525 Natomas Park Drive, Suite 130
Sacramento, CA 95833

Re: Approval of CPVC, PEX, PEX-AL-PEX, ABS and PVC Piping in the 2007 California Plumbing Code

Dear Mr. Walls and Mr. Morrison:

The City and County of San Francisco ("San Francisco") urges the California Building Standards Commission to study further the proposed adoption of building standards approving the use of PEX and PEX-AL-PEX drinking water pipe and expanding the approved uses of CPVC drinking water pipe and PVC and ABS drain, waste and vent ("DWV") pipe. The specific proposals that would approve or expand approval of these materials are contained in the proposed amendments to California Plumbing Code sections 316.1.6, 604.1, 604.1.1, 604.1.2, 604.11, 604.11.1, 604.11.2, 604.13, 604.13.1, 604.13.2, 701.1.2.2, 903.1.2.2, 1101.3.1, 1101.3.3, 1102.1.2 and Table 6-4.

We are concerned that these plastic pipe plumbing materials have been proposed for approval without adequate examination of the potential public health and safety impacts associated with the use of these products. We are also concerned that the approval of these products without adequate environmental review violates the California Environmental Quality Act ("CEQA").

In considering whether to approve or expand the approved uses of PEX, PEX-AL-PEX, CPVC, ABS or PVC plastic pipe or any other potentially hazardous building material, CEQA requires that public agencies be fully informed about the potential impacts of these products on public health and the environment. The California Court of Appeal recently upheld the applicability of CEQA to the approval of proposed building standards in the *Plastic Pipe and Fitting Association v. California Building Standards Commission* (2004), 124 Cal. App. 4th 1390 ("PPFA v. CBSC") case. San Francisco was involved in that case as amicus curiae.

San Francisco has a direct interest in ensuring environmental review of these plastic pipe components because the proposed regulations require local entities to allow their use within each jurisdiction, unless specific findings can be made. Accordingly, we believe that it is critical that state agencies be fully informed of a new building material's potential impacts before deciding on a course of action. Once approved at the state level, local governments are limited in their authority to restrict the use of building

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materials at the local level. Our building department would thus be required to allow the use of CPVC, PEX, PEX-AL-PEX, ABS and PVC even if the Commission adopted these regulations without adequate environmental review.

1. The Environmental Impact Report Prepared on CPVC Fails to Adequately Evaluate Numerous Significant Impacts.

In support of the proposed regulations to expand the approved use of CPVC potable water pipe, the Department of Housing and Community Development ("HCD") has prepared a Draft Environmental Impact Report ("DEIR"), dated July 2006. We believe the CPVC DEIR inadequately evaluates or fails altogether to evaluate numerous potential impacts associated with the expanded approval. In addition, the DEIR fails to adequately assess alternatives or identify sufficient mitigation measures to address these impacts.

For example, the DEIR ignores the difficulties cities have faced in recycling and disposing of CPVC. The DEIR concludes that recycling and reuse of CPVC pipe is both technically feasible and likely given current trends in plastic recycling. This conclusion fails to take into account the well-documented difficulties in recycling CPVC.

The DEIR must also be revised to evaluate evidence that the expanded approval of CPVC may result in significant worker health and safety impacts. Dr. Jim Bellows provided comments on September 8, 2006, concluding that "workers who install CPVC pipe are likely to be overexposed to toxic primer and cement solvents above the legal limits on a regular basis." He also concludes that the current requirement that workers use nitrile gloves fails to mitigate these impacts and "could actually increase absorption of contaminants."

Rather than evaluating the evidence of potential worker health impacts, the lead agency claims that it is not legally required to evaluate this issue. HCD claims that the 2000 Mitigated Negative Declaration on the restricted, discretionary approval of CPVC pipe provides safe harbor from having to evaluate this issue in the context of the proposed expanded, non-discretionary approval of CPVC pipe. This position is both legally incorrect and bad public policy.

Tiering, or relying on an earlier environmental document, is appropriate "when the sequence of analysis is from an EIR . . . to an EIR or negative declaration." (CEQA Guidelines § 15152(b).) The DEIR, however, improperly attempts to tier from a prior mitigated negative declaration. An EIR may not tier from a narrower project of lesser scope. (CEQA Guidelines § 15152(a) and (b).) There can be no dispute that the restricted use of CPVC evaluated in the 2000 Mitigated Negative Declaration was significantly narrower in scope than the proposed expanded approval evaluated in the DEIR.

In addition, refusing to evaluate credible evidence that the proposed regulations may potentially expose workers to toxic chemicals is bad public policy. HCD's refusal to evaluate this issue needlessly and unreasonably puts the health and safety of the workers in our jurisdiction at risk.

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Finally, the DEIR admits that the expanded approval of CPVC will result in significant air quality impacts, yet fails to evaluate environmentally preferred alternatives to CPVC. The DEIR states that the solvents used to install CPVC pipe are significant sources of ozone and smog. Ozone and smog pollution are serious health issues in our air basin. Smog exposure is known to cause numerous serious illnesses and deaths. It results in permanent deficits to children's lung development and is linked to the development of asthma in healthy children.

The current approved use of CPVC potable water pipe is both limited and discretionary; thus mitigating the potential impact on air quality. The proposed expanded approval of CPVC, however, eliminates these feasible mitigation measures.

In addition, the DEIR fails to evaluate and identify environmentally superior alternatives to the expanded approval of CPVC. The DEIR identifies several Project alternatives, yet fails to take the required step of evaluating which alternative is the environmentally superior option. (DEIR at p. 3; CEQA Guidelines § 15126.6.) The DEIR must be revised and recirculated to evaluate potential alternatives that may eliminate or reduce air quality and other impacts.

Under the nine point criteria of Health and Safety Code section 18930, proposed building standards may not be approved where their adoption would not be in the "public interest" or would be "unreasonable, arbitrary, unfair or capricious." The expanded approval of CPVC pipe without first complying with CEQA and adequately evaluating and mitigating the potential impacts on workers, consumers and the general public would be both "unreasonable, arbitrary, unfair or capricious" and contrary to the "public interest." Accordingly, we urge the California Building Standards Commission to "disapprove" or "hold for further study" the proposed regulations expanding the approval of CPVC pipe.

2. An EIR Must Be Prepared Prior to the Approval of PEX and PEX-AL-PEX.

In support of the proposed regulations approving PEX and PEX-AL-PEX potable water pipe, HCD has released a Negative Declaration, dated September 2006. This Negative Declaration, however, is insufficient to meet the requirements of CEQA and to ensure the protection of the public. A negative declaration is improper, and an EIR is required, whenever substantial evidence in the record supports a "fair argument" that significant impacts may occur. (Pub. Resources Code § 21080.)

Substantial evidence of potential impacts from the use of PEX and PEX-AL-PEX has been submitted to HCD during several past proceedings, including the proceedings reviewed by the court in the *PPFA v. CBSC* case. The court in that case found that a letter by plastic pipe expert Thomas Reid raised grave concerns about the potential dangers posed by the use of PEX, "including the potential for (1) chemical leaching of substances from the pipes; (2) permeation of the pipes by toxic substances contained in the surrounding soil and groundwater; (3) mechanical failure of the pipes; and (4) rupturing of the pipes when exposed to high heat, which may create openings that could contribute to the spread of fire." (*PPFA v. CBSC*, 124 Cal. App. 4th at 1407.) The court then concluded that "the Reid letter is substantial evidence . . . that PEX potentially may

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present an unreasonable risk of harm." (*Id.*) In light of this holding, an EIR must be prepared.

Moreover, approval of PEX and PEX-AL-PEX without proper environmental review would not be in the public interest. There is substantial evidence that the approval of PEX and PEX-AL-PEX piping for potable water plumbing systems may result in significant public health and environmental impacts. The Negative Declaration fails to adequately evaluate or mitigate these impacts.

For example, the negative declaration fails to evaluate the potential increased solid waste disposal impacts due to the potential switch from recyclable copper pipes to non-recyclable PEX pipes. The 2005 draft "Plastic Pipe Alternatives Assessment" found that the recycling market for PEX pipe is "very limited" and that PEX "can never be closed loop recycled." (Rossi, et al, Draft Plastic Pipe Alternatives Assessment (2/11/2005) at p. 17.) The Assessment also found that PEX pipe was the only plastic not accepted by any of the regional plastic recyclers in the Bay area. (*Id.* at p. 16.)

The limited discussion of solid waste impacts contained in the Negative Declaration is also inadequate because it limits its analysis to "tear-downs." This analysis fails to account for the potentially much larger source of waste resulting from the re-piping of homes that are not being torn down.

The Negative Declaration also fails to adequately evaluate concerns over permeation, leaching, biofilm, fire and premature rupture impacts. The Negative Declaration admits that each of these issues is a concern with PEX and PEX-AL-PEX, yet then summarily dismisses these concerns without adequate evaluation or mitigation. For example, the Negative Declaration concludes that no substantial evidence exists that the approval of PEX may result in significant impacts despite its admissions that:

- Tests have shown that PEX and PEX-AL-PEX pipe may leach high levels of MTBE and that PEX should not be used in areas of the state with MTBE water contamination. (*Id.* at pp. 7-8.)
- PEX pipe that meets ASTM standards "may fail in the field before 50 years, especially if it has suffered stabilizer loss due to other factors." (*Id.* at p. 5.)
- PEX is subject to permeation by toxic chemicals when exposed to contaminated soils or when sprayed with termiticides or pesticides. (*Id.* at p. 7.)
- PEX may increase the risk of exposure to *Legionella* due to biofilm formation for at least the first two years of its use. (PEX Initial Study/Negative Declaration at p. 11.)

The conclusory dismissal of these concerns is logically inconsistent with the admissions of fact in the Negative Declaration. Moreover, while admitting that PEX is subject to each of these concerns, the Negative Declaration fails to impose any mitigation measures to address these issues.

CEQA requires the preparation of an EIR where any substantial evidence exists of potential impacts, even where contrary evidence may exist. (*Stanislaus Audubon v.*

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County of Stanislaus (1995) 33 Cal.App.4th 144, 150-151) Accordingly, the admission of potential impacts requires the preparation of an EIR even if the Negative Declaration concludes that other factors may argue against the likelihood of such impacts occurring. An EIR must be prepared to evaluate the evidence of these impacts and to determine if feasible alternatives exist or if mitigation measures can be imposed to reduce these risks.

Approval of PEX and PEX-AL-PEX pipe without first preparing an EIR would be contrary to CEQA and the nine point criteria of Health and Safety Code section 18930. Such approval would be both "unreasonable, arbitrary, unfair or capricious" and contrary to the "public interest." Accordingly, we urge the California Building Standards Commission to "disapprove" or "hold for further study" the proposed regulations allowing the use of PEX and PEX-AL-PEX plastic pipe.

3. An EIR Must Be Prepared Prior to the Approval of PVC and ABS Drain, Waste and Vent Pipe.

HCD has proposed lifting its restrictions on the use of PVC and ABS DWV pipes. To date, no environmental review has been prepared to evaluate the potential impacts of this proposed approval.

We believe that an EIR must be prepared prior to the expanded approval of PVC and ABS DWV pipe. The current restrictions on PVC and ABS DWV pipe are, in part, due to concerns over the increased risk of fire spread these materials may pose. DWV pipes are large in diameter, increasing the risk of fire spread to other rooms in a dwelling. ABS is considered particularly flammable and releases thick choking smoke when burned. Like CPVC, PVC releases cancer-causing dioxins when burned.

ABS also has a history of premature failure. In addition, both PVC and ABS are susceptible to degradation if certain substances are disposed down the drains. Failure of DWV pipes presents a significant health hazard because they carry sewer gas and human waste.

Like CPVC, ABS and PVC are installed using toxic solvents. The expanded use of these solvents may have cumulatively significant impacts on air quality and worker health and safety.

We urge the California Building Standards Commission to ensure that an adequate EIR is prepared to evaluate the proposed regulations expanding the approved use of PVC and ABS DWV pipe. Until such an EIR is prepared, these proposed regulations are not appropriate for adoption under the nine point criteria of Health and Safety Code section 18930. Such approval would violate CEQA and be both "unreasonable, arbitrary, unfair or capricious" and contrary to the "public interest." We respectfully request the California Building Standards Commission to "disapprove" or "hold for further study" the proposed regulations expanding the allowed use of PVC and ABS DWV pipe.

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Conclusion

We are concerned that the proposals before the California Building Standards Commission to approve or expand the approved uses of CPVC, PEX, PEX-AL-PEX, ABS or PVC plastic pipe may needlessly put the workers, homeowners, and residents of the City and County of San Francisco at risk. Approval of these products without first resolving the numerous concerns associated with their use is bad public policy and is inconsistent with the requirements of CEQA.

The City and County of San Francisco respectfully asks the Commission to reject the proposed regulations permitting the use of CPVC, PEX, PEX-AL-PEX, ABS and PVC plastic pipes until full environmental review is completed.

Thank you for considering our comments.

Very truly yours,

DENNIS J. HERRERA
City Attorney



Kate H. Stacy
Deputy City Attorney

cc: Lynn Jacobs,
Director, Department of Housing and Community Development